

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

TRANSCRIPT OF RECORD

COURT OF APPEALS, DISTRICT OF COLUMBIA

APRIL TERM, 1930

—
No. 5231

879

WILLIAM LEE MOFFATT, APPELLANT

vs.

UNITED STATES

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA

FILED JUNE 11, 1930

COURT OF APPEALS, DISTRICT OF COLUMBIA

APRIL TERM, 1930

No. 5231

WILLIAM LEE MOFFATT, APPELLANT

vs.

UNITED STATES, APPELLEE

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA

INDEX

	Original Print	
Caption.....	a	1
Indictment.....	1	1
Endorsement.....	7	4
Memoranda: Defendant arraigned, plea not guilty entered; verdict guilty as to 3d and 4th counts, not guilty (by direc- tion of court) as to 1st and 2d counts of indictment.....	7	4
Motion for new trial.....	7	5
Order overruling motion for new trial.....	8	5
Exception prayed and noted; sentence; appeal noted by defendant.....	9	6
Memorandum: Bill of exceptions filed.....	9	6
Assignments of error.....	9	6
Memorandum: Cost bond on appeal (\$100) approved and filed.....	11	7
Order making bill of exceptions part of record.....	12	7
Designation of record.....	12	7
Clerk's certificate.....	14	8
Bill of exceptions.....	15	8
Testimony of Marie T. Pauli.....	15	9
Avon M. Nevius.....	19	11
Richard Norris.....	20	12
George R. Linkins.....	21	12
Charles C. Koonen.....	22	13
Robert T. Highfield.....	22	13
Daniel Dillon.....	23	13
Samuel B. Eaton.....	24	14
George D. Horning.....	25	14
Christian Stoll.....	28	16
Ida Stoll.....	29	17
Marie Louise Stoll.....	30	17
Edgar M. Peterson.....	34	20
William L. Moffatt.....	38	22
Prayers.....	43	25
Charge to jury.....	44	26

Supreme Court of the District of Columbia

UNITED STATES
vs.
WILLIAM LEE MOFFATT } Criminal No. 46688

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Indictment*

Filed in open court Feb. 21, 1928. Frank E. Cunningham, clerk.
In the Supreme Court of the District of Columbia, holding a criminal term

JANUARY TERM, A. D. 1928

DISTRICT OF COLUMBIA, ss:

The grand jurors of the United States of America, in and for the District of Columbia aforesaid, upon their oath, do present:

That one William Lee Moffatt, late of the District of Columbia aforesaid, on, to wit, the twenty-ninth day of September, in the year of our Lord one thousand nine hundred and twenty-seven, and at the District of Columbia aforesaid, did have in his possession nine certain promissory notes, to wit, nine notes each for one thousand dollars, each note of the value of one thousand dollars, and each of said notes signed by Howard M. Etchison and dated December 11, 1924, and each of said notes secured by deed of trust on lot four in square three hundred and seventy-seven, said notes being the property of one Marie T. Pauli, which said nine promissory notes, each of the value aforesaid, had been delivered and entrusted to him, the said William Lee Moffatt, for the purpose of applying the same for the use and benefit of the said Marie T. Pauli; and that the said William Lee Moffatt, so being entrusted with the possession of the said nine promissory notes, each of the value aforesaid, of the property of the said Marie T. Pauli, in the manner and form aforesaid, and for the purpose aforesaid, and while so possessed as aforesaid, did then and there, to wit, on the said twenty-ninth day of September, in the year of our Lord one thousand nine hundred and

2 twenty-seven, and at the District of Columbia, aforesaid, feloniously, unlawfully, and fraudulently convert the same to his own use, against the form of the statute in such case made and provided, and against the peace and government of the said United States.

Second Count

And the grand jurors aforesaid, upon their oath aforesaid, do further present:

That the said William Lee Moffatt, on, to wit, the fourth day of October, in the year of our Lord one thousand nine hundred and twenty-seven, and at the District of Columbia aforesaid, did have in his possession twelve certain promissory notes, to wit, one note for one thousand dollars, signed by Preston P. Bogley and dated March 4, 1924, said note being secured by deed of trust on lot two hundred and ninety-one in square one hundred and fifty, and said note being of the value of one thousand dollars; two notes each for five hundred dollars, signed by Preston P. Bogley and dated March 4, 1924, said notes each being secured by deed of trust on lot two hundred and ninety-one in square one hundred and fifty, and each note of the value of five hundred dollars; two notes each for one thousand dollars, signed by Howard M. Etchison and dated June 1, 1925, said notes each being secured by deed of trust on lot one, in square one hundred and three, and each note of the value of one thousand dollars; one note for thirty-five hundred dollars, signed by Violet S. Wolf and dated April 2, 1924, said note being secured by deed of trust on lot twenty-six in square sixty-one, and said note being of the value of thirty-five hundred dollars; one note for thirty-five hundred dollars, signed by Violet S. Wolf and dated April 2, 1924, said note being secured by deed of trust on lot twenty-five in square sixty-one, and said note being of the value of thirty-five hundred dollars; four notes each for five hundred dollars, signed by William B. Wright and dated July 21, 1926, said notes each being secured by deed of trust on lot I in square thirty-six, and said notes each being of the value of five hundred dollars; and one note for two hundred and fifty dollars, signed by William B. Wright and dated July 21, 1926, said note being secured by deed of trust on lot I in square thirty-six, said note being of the value of two hundred and fifty dollars; of the property of the said Marie T. Pauli, which said promissory notes above referred to, each of the value aforesaid, had been delivered and entrusted to him, the said William Lee Moffatt, for the purpose of applying the same for the use and benefit of the said Marie T. Pauli; and that the said William Lee Moffatt, so being entrusted with the possession of the said promissory notes, each of the value aforesaid, of the property of the said Marie T. Pauli, in the manner and form aforesaid, and for the purpose aforesaid, and while so possessed as aforesaid, did then and there, to wit, on the said fourth day of October, in the year of our Lord one thousand nine hundred and twenty-seven, and at the District of Columbia aforesaid, feloniously, unlawfully, and fraudulently convert the same to his own use, against the form of the statute in such case made and provided, and against the peace and government of the said United States.

Third Count

And the grand jurors aforesaid, upon their oath aforesaid, do further present:

That the said William Lee Moffatt, on, to wit, the twenty-ninth day of September, in the year of our Lord one thousand nine hundred and twenty-seven, and at the District of Columbia aforesaid, unlawfully, knowingly, designedly, and with intent to defraud, feloniously did falsely pretend and represent to one Marie T. Pauli, then and there being, that he, the said William Lee Moffatt, was backed by the Riggs National Bank, of this city, and that the said Riggs National Bank was behind the investment of money in the Bankers Investment Trust Corporation.

By color and means of which false pretenses and representations aforesaid, he, the said William Lee Moffatt, knowingly, designedly, and with intent to defraud, did then and there feloniously and unlawfully obtain from the said Marie T. Pauli nine certain promissory notes, to wit, nine notes each of one thousand dollars, each of the value of one thousand dollars, and each of said notes signed by Howard M. Etchison and dated December 11, 1924, and each of said notes secured by deed of trust on lot four in square three hundred and seventy-seven, said notes being the property of the said Marie T. Pauli, which said promissory notes, each of the value aforesaid, the said Marie T. Pauli, relying upon the false pretenses and representations aforesaid, which she believed to be true, and being deceived thereby did deliver to the said William Lee Moffatt.

Whereas, in truth and in fact, the said William Lee Moffatt was not backed by the said Riggs National Bank of this city, nor was the said Riggs National Bank behind the investment of money in the Bankers Investment Trust Corporation, as he, the said William Lee Moffatt, at the time of the making by him of the false pretenses and representations aforesaid, then and there well knew, against the form of the statute in such case made and provided, and against the peace and government of the said United States.

5

Fourth Count

And the grand jurors aforesaid, upon their oath aforesaid, do further present:

That the said William Lee Moffatt, on, to wit, the fourth day of October, in the year of our Lord one thousand nine hundred and twenty-seven, and at the District of Columbia aforesaid, unlawfully, knowingly, designedly, and with intent to defraud, feloniously did falsely pretend and represent to one Marie T. Pauli, then and there being, that he, the said William Lee Moffatt, was backed by the Riggs National Bank of this city, and that the said Riggs National Bank was behind the investment of money in the Bankers Investment Trust Corporation.

By color and means of which false pretenses and representations aforesaid, he, the said William Lee Moffatt, knowingly, designedly, and with intent to defraud, did then and there feloniously and unlawfully obtain from the said Marie T. Pauli twelve certain promissory notes, to wit, one note for one thousand dollars, signed by Preston P. Bogley and dated March 4, 1924, said note being secured by deed of trust on lot two hundred and ninety-one in square one hundred and fifty, and said note being of the value of one thousand dollars; two notes each for five hundred dollars, signed

by Preston P. Bogley and dated March 4, 1924, said notes each being secured by deed of trust on lot two hundred and ninety-one in square one hundred and fifty, and each note of the value of five hundred dollars; two notes each for one thousand dollars, signed by Howard M. Etchison and dated June 1, 1925, said notes each being secured by deed of trust on lot one, in square one hundred and three, and each note of the value of one thousand dollars; one note for thirty-five hundred dollars, signed by Violet S. Wolf and dated April 2, 1924, said note being secured by deed of trust on lot twenty-six in square sixty-one, and said note being of the value of thirty-five hundred dollars; one note for thirty-five hundred dollars, signed by Violet S. Wolf and dated April 2, 1924, said note being secured by deed of trust on lot twenty-five in square sixty-one, and said note being of the value of thirty-five hundred dollars: four notes each for five hundred dollars, signed by William B. Wright and dated July 21, 1926, said notes each being secured by deed of trust on lot I in square thirty-six, and said notes each being of the value of five hundred dollars; and one note for two hundred and fifty dollars, signed by William B. Wright and dated July 21, 1926, said note being secured by deed of trust on lot I in square thirty-six, said note being of the value of two hundred and fifty dollars, said notes being the property of the said Marie T. Pauli, which said promissory notes, each of the value aforesaid, the said Marie T. Pauli, relying upon the false pretenses and representations aforesaid, which she believed to be true, and being deceived thereby did deliver to the said William Lee Moffatt.

Whereas, in truth and in fact, the said William Lee Moffatt was not backed by the said Riggs National Bank of this city, nor was the said Riggs National Bank behind the investment of money in the Bankers Investment Trust Corporation, as he, the said William Lee Moffatt, at the time of the making by him of the false pretenses and representations aforesaid, then and there well knew, against the form of the statute in such case made and provided, and against the peace and government of the said United States.

PEYTON GORDON,

*Attorney of the United States in
and for the District of Columbia.*

7 (Indorsed:) Criminal No. 46688. United States vs. William Lee Moffatt. Violation of section 851 b, D. C. Code, and false pretenses. Witnesses: Marie T. Pauli, Alois Pauli, Handley Henderson. A true bill: Martin D. McQuade, foreman.

Memoranda

APRIL 14, 1928.

Defendant arraigned. Plea not guilty entered.

DECEMBER 18, 1929.

Verdict guilty as to 3d and 4th counts, not guilty (by direction of court) as to 1st and 2d counts of indictment.

Motion for new trial

Filed December 23, 1929

* * * * *

Now comes the defendant by his attorneys and moves the court for a new trial in the above entitled cause for the following among other reasons:

1. That the verdict of the jury was contrary to the evidence.
- 8 2. That the verdict of the jury was contrary to the weight of the evidence.
3. That the court erred in admitting evidence contrary to law.
4. That the court erred in refusing to admit evidence contrary to law.
5. That the court erred in charging the jury.
6. That the jury was improperly impanelled.
7. That the court erred in denying defendant's motion for an election at the end of the Government's case.
8. That the court erred in permitting the district attorney to make an improper argument to the jury.

JAMES A. O'SHEA,
JOHN H. BURNETT,
ALFRED GOLDSTEIN,
Attorneys for Defendant.

Service accepted.

PHILIP F. BIGGINS,
Chief Clerk, U. S. Attorney's Office.

Supreme Court of the District of Columbia

SATURDAY, FEBRUARY 8," A. D. 1930.

The court resumes its session pursuant to adjournment, Mr. Justice Hitz, presiding.

* * * * *

Come as well the attorney of the United States, as the defendant in proper person, in custody of the superintendent of the Washington Asylum and Jail and by his attorney John H. Burnett, Esquire; and thereupon the defendant's motion for a new trial coming on to be heard, after argument by the counsel is by the court overruled, to which action of the court the defendant 9 by his attorney prays an exception, which is noted; whereupon it is demanded of the defendant what further he has to say why the sentence of the law should not be pronounced against him, and he says nothing except as he has already said; and thereupon it is considered by the court that for his said offense the said defendant be taken by the superintendent aforesaid to the asylum and jail aforesaid, whence he came, thence to the penitentiary as designated by the Attorney General of the United States, there to be imprisoned for the period of two (2) years and six (6) months on each of the 3d and 4th counts of the indictment, said sentence by counts to run consecutively and to take effect from and

including the date of arrival of said defendant at said penitentiary; whereupon the defendant by his attorney notes an appeal to the Court of Appeals of the District of Columbia, from the judgment of the court in this case; whereupon the court fixes the amount of bond for costs on appeal at one hundred dollars or fifty dollars in cash.

Memorandum

FEBRUARY 24, 1930.

Bill of exceptions filed.

Assignments of Error

Filed February 24, 1930

* * * * *

Now comes the defendant, William L. Moffatt, by his attorneys, James A. O'Shea, John H. Burnett, and Alfred Goldstein, and assign for review to the Court of Appeals of the District of Columbia, on appeal in the above-entitled cause, the following errors committed by the trial court:

10 1. In permitting the witness Nevius to testify to anything concerning the Riggs National Bank.

2. In allowing any testimony as to the Riggs National Bank to be admitted against the defendant.

3. In overruling the objection of the defendant that the indictment did not charge that the Riggs National Bank was a person, individual, firm, partnership, or corporation.

4. In refusing to rule that the indictment charged defendant with making a false representation as to something that did not exist and was a nonentity, to wit, the Riggs National Bank of this city.

5. In allowing the witness Nevius to state that the Riggs National Bank was a corporation.

6. In allowing the witness Nevius to testify that the Riggs National Bank was not backing the defendant or the Bankers Investment Trust Corporation.

7. In permitting the witness Norris to testify concerning an account of defendant with the Lincoln National Bank.

8. In admitting in evidence the last said account.

9. In allowing the witness Highfield to testify about a note teller's settlement sheet of the Mt. Vernon Savings Bank.

10. In permitting the witness Horning to narrate a conversation had with defendant.

11. In refusing to compel the Government to elect between the first and second counts and the third and fourth counts of the indictment at the close of the Government's case.

12. In refusing to direct a verdict of not guilty at the close of the Government's case.

13. In refusing to direct a verdict of not guilty at the close of the entire case.

11 14. In allowing the United States attorney to cross-examine the defendant beyond the scope of the direct examination.

15. In refusing to allow defendant to prove a contract showing an agreement with several persons whereby defendant was to be reim-

bursed in stock of a new corporation for that sold in the Bankers Investment Trust Corporation.

16. In failing to impartially charge the jury.

17. In emphasizing the testimony of the Government witnesses in the court's charge to the jury.

18. In failing to charge the jury as to the testimony of Peterson.

19. In charging the jury that Mrs. Pauli was corroborated and in refusing to charge that Moffatt was corroborated.

JAMES A. O'SHEA,
J. H. BURNETT,
ALFRED GOLDSTEIN,
Attorneys for Defendant.

Service of copy acknowledged this 24th day of February, A. D. 1930.

LEO A. ROVER,
S.,
*United States Attorney in and
for the District of Columbia.*

Memorandum

FEBRUARY 26, 1930.

Cost bond on appeal (\$100) approved and filed.

12 Supreme Court of The District of Columbia

FRIDAY, MARCH 21'', A. D. 1930.

The court resumes its session pursuant to adjournment, Mr. Justice Hitz presiding.

* * * * *

Now comes here the defendant, by his attorneys, Messrs. John H. Burnett and James A. O'Shea, submits to the court his bill of exceptions taken during the trial of this case and filed with the court on the 24th day of February, 1930, and prays the court to sign and make a part of the record his said bill of exceptions, which is accordingly done.

Designation of Record

Filed February 24, 1930

* * * * *

The clerk will please make up the record for the Court of Appeals to consist of the following:

1. The indictment.
2. The plea.
3. The verdict of the jury.
4. Motion for a new trial.

5. Order overruling motion for new trial and exception thereto.
6. Judgment of court, and exception thereto.
7. Appeal noted.
8. Cost bond.
9. Bill of exceptions.
10. Assignments of error.
11. This designation of record.

JAMES A. O'SHEA,
J. H. BURNETT,
ALFRED GOLDSTEIN,
Attorneys for Defendant.

- 13 Service of copy acknowledged this 24th day of February,
A. D. 1930.

LEO A. ROVER,
S.,
*United States Attorney in and
for the District of Columbia.*

- 14 Supreme Court of The District of Columbia

UNITED STATES OF AMERICA.

District of Columbia, ss:

I, Frank E. Cunningham, clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 13, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in the case of United States vs. William Lee Moffatt, Criminal No. 46688, as the same remains upon the files and of record in said court.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 23rd day of May, 1930.

[SEAL.]

FRANK E. CUNNINGHAM, *Clerk.*

- 15 In the Supreme Court of the District of Columbia

Holding a criminal term

UNITED STATES VS. WILLIAM LEE MOFFATT, DEFENDANT

Crim. No. 46688

Bill of exceptions

This cause came on for trial before the Honorable William Hitz, Associate Justice of the Supreme Court of the District of Columbia, and a jury, on December 16, 1929, the United States being represented by the Honorable Leo Rover and William Gallagher and the defendant by John H. Burnett, and the following proceedings were had:

That the Government, to maintain the issues on its part joined, called one Marie T. Pauli, who testified substantially as follows:

That she first saw Moffatt in the latter part of September, 1927; Mr. Peterson came one day and Moffatt came the next; that witness's husband, Alois Pauli, and one Marie Stoll were present; that Moffatt said that the Riggs Bank was backing him; also, if the Riggs Bank failed Uncle Sam would fail, too; that witness would not have gone into it if Moffatt had not said the Riggs Bank, because we explicitly believed in the Riggs Bank; that Moffatt told witness that the Riggs Bank was behind all his dealings with me; that witness signed a subscription agreement for the purchase of stock in the Bankers Investment Trust Corporation; that acting upon this, witness directed that a \$9,000 investment which she had at one Mr. Linkins' be turned over to Moffatt; witness thereupon identified 6 promissory notes which were the things that she directed to be turned over to Moffatt; that Moffatt gave her a receipt therefor, which she identified; that over the objection and exception of defendant, witness was permitted to state that she directed a third person to turn over to Moffatt \$13,250 worth of real estate notes; the ground of said objection was that the testimony was hearsay; that this direction was given on October 4, 1927; that thereafter witness obtained a receipt from Moffatt for said \$13,250 the same being offered and admitted in evidence; that before she so directed the turning over to Moffatt of said notes witness was told by Moffatt "just the same way as the first"; that she believed the representations Moffatt had made and that was why she turned over the notes to him; that witness never received any stock from Moffatt in the Bankers Investment Trust Corporation; that she received \$4,000 or \$5,000 back from Moffatt, of which she got \$2,195, the balance going to one Mrs. Stoll; that this money was given to her by one George D. Horning; that on October 4, 1927, when witness talked to Moffatt concerning the \$13,250 transaction there was present her husband and one Miss Stoll.

The witness, Mrs. Pauli, stated on cross-examination that she first talked to one Edgar Peterson; that he had been known to her for some time and that he had handled some real estate transaction for her; that Moffatt did not know her at the time Peterson came to see her; that Peterson knew that she had some money to invest; that Peterson told her that he had an investment for her that he thought was good; that they talked about it, but she did not remember the conversation; that she had, at that time, some notes signed by one Howard M. Etchison; that she was not alarmed as to the security for these notes; that she heard about the bankruptcy of said Etchison but was not afraid of her money; that she read about it in the Star; that she and Peterson did not talk about this bankruptcy proceeding; that she did not think she was going to lose the money she had in the Etchison notes and was not anxious to put her money in anything, "not in anything like that, in particular"; that Moffatt told her that the Bankers Trust Corporation was the most profitable thing that could be; that she does not remember what books Moffatt had with him at that time, as he had a dozen or so; that Moffatt did not tell her that the company was being organized for the purpose of buying bank stocks; that the following then took place:

Question. "All right. Now, didn't Mr. Moffatt say to you that he could show you from the books he left with you that a purchase of bank stocks over a twenty-one year period showing that if you bought different bank stocks would show an average increase, and the Bankers Investment Trust Corporation was going to so invest?"

Answer. "No; he did not say that way. He said it would increase in years to come."

That witness then stated that Moffatt did not say that he intended to purchase several different bank stocks after the corporation was on a working basis and that one of the stocks mentioned was the Riggs National Bank; but that Moffatt did say "banks all over the United States," and especially that the Riggs Bank, was backing him; that that was her reason for buying the stock; that Moffatt's exact words were: "The Riggs National Bank is in back of me"; that Moffatt did not tell her that the Riggs National Bank was behind the Bankers Investment Trust Corporation; that Moffatt told her that when the certificates of stock were printed he would give them to her; that this would be in a few days; that the written contract for her purchase of \$9,000 worth of stock in the corporation was admitted in evidence; that she did not read it fully and it was not read to her; that she did not understand the contract but she did

18 understand that Moffatt was going to get her investment bonds, but she did not get anything; that she signed the contract on Moffatt's word; that she had seen him and met him dozens of times before this; that she had not seen Moffatt dozens of times before this date of September 29, 1927; that Mr. Peterson had been talking to her about this investment and it was his idea to sell stock to people; but Peterson did not tell her that it was the idea of the Bankers Investment Trust Corporation to get money and invest it; that Peterson did tell her that her money was to be invested in stock of the Bankers Investment Trust Corporation, with the Riggs Bank behind him; that she had known Peterson for one to three years, he had been selling property for her; that he knew that "we" had money; that he told her that she was very careless in the investing of her money and that he would invest it much better; that she trusted Mr. Peterson and that he brought Moffatt to the house to see her; that neither Moffatt nor Peterson told her that the Riggs National Bank was superintending, overlooking, or managing the affairs of the Bankers Investment Trust Corporation, but that Peterson said that if one of the banks failed, the other bank would pick it up, the other bank was right behind it; that Moffatt told witness that if the stock she bought was no good, the Riggs Bank would make it good; that Moffatt made this statement either the day before she signed the written contract, the same day, or the day after; Miss Stoll and Mr. Pauli were present; that Mr. Peterson was not present when Moffatt came to see her; that Moffatt wanted to invest the \$13,250 the same way as suggested about the \$9,000; that she read the written contract for purchase of \$9,000 worth of stock before she signed it; that she did not read said contract; that after signing the written contract she and her husband discussed the matter, "we thought it was perfect, and everything was all right," and this before the transaction of October 4, 1927; that she

19 became dissatisfied with her bargain and asked Moffatt for her money back; that Moffatt said he would "pay us some money back; that this was October 24 or 25, at my home; that she never saw any certificates for shares of stock in the Bankers Investment Trust Corporation.

That on redirect examination witness stated that Mr. Peterson was not present when Moffatt made aforesaid representations to her; that on recross-examination witness stated that Moffatt made said representations to her when Peterson was there; that such representations were not made in her presence; that Moffatt made said representations every time Peterson was present; that Moffatt did not make said representations when Peterson was there.

That then and thereupon the Government, to further maintain the issues on its part joined, called one Avon M. Nevius, who testified substantially as follows:

That he was vice president of the Riggs Bank.

Whereupon defendant objected to the introduction of any testimony concerning the Riggs Bank, for the reason that the indictment charged that Moffatt made certain representations as to the Riggs National Bank of this city, whereas said bank as charged is a nonentity; that the indictment does not charge that said bank is a corporation, a partnership, or a person trading as the Riggs National Bank; that it could not be shown by this or any other witness that the Riggs Bank of this city, which was a body corporate, had or had not anything to do with said Moffatt; that the indictment charged defendant with making a representation as to something which did not exist; that there can be no such thing as alleged in said indictment and no one could have relied upon said representation, because there was no such thing as the Riggs National Bank of this city; that there was no such creature known to the law and no such creature known in fact; that said Riggs National Bank of this city is neither a creature of law or of fact; that said objection was overruled and defendant noted an exception on the ground stated.

20 Whereupon defendant noted an exception to the admission of any testimony from this witness on the grounds last stated.

That witness stated that said bank was a corporation and defendant moved to strike the statement on the ground that it was a conclusion upon the part of the witness and did not show that said bank was a corporation; that said motion was overruled and defendant noted an exception on the ground that such testimony did not prove either a corporation de facto or de jure.

That witness further stated that he performed any official act for the bank, made loans, opened accounts, or discounted notes; that he was generally familiar with the transactions between the depositors of the bank and the bank itself; that he was not on the board of directors of said bank.

Witness was then asked whether or not in September or October, 1927, the Riggs National Bank was backing William L. Moffatt; that defendant objected to such question on the ground that witness had not been shown to be qualified to answer; that said objection was overruled and an exception noted; whereupon witness stated that the bank was not backing Moffatt; witness was then asked if the bank,

so far as he knew, at any time, backed Moffatt; defendant objected on the ground last stated, and the objection was overruled and an exception noted; witness stated that the Riggs Bank never did back Mr. Moffatt; witness was asked if the Riggs Bank, at any time, including the months of September and October, 1927, was behind investment of money in the Bankers Investment Trust Corporation; the same objection was made on the same ground, the same was overruled and an exception was noted; witness stated that said bank was not behind said corporation in any capacity that he knew of; defendant was allowed and noted an exception to all of this witness's testimony.

Whereupon, to further maintain the issues upon its part joined, the Government called as a witness one Richard Norris,
21 who testified substantially as follows:

That he was assistant cashier and manager of the Seventeenth and H Street office of the Lincoln National Bank; that witness produced, under order of a subpoena duces tecum, an account of W. L. Moffatt & Co. with said bank, which was objected to on the ground that witness did not make the entries thereon; the objection was overruled and exception noted, the court stating:

"I suppose you offer him as the custodian of those."

Mr. ROVER. "Yes."

Whereupon the entire account of W. L. Moffatt & Co. was admitted in evidence over said objection and exception of defendant on the grounds last stated. Witness then identified a check for \$9,012.50 deposited to the credit of W. L. Moffatt & Co. in said bank on October 3, 1927; that witness said, from looking at said statement of account, that \$6,778.33 was deposited to the account of W. L. Moffatt & Co. on October 14, 1927, \$1,974.67 on October 9, 1927, and \$2,238.69 on October 9, 1927; that witness could not tell from looking at said statement whether the last three deposits were made up of three or four items; that witness produced a signature card signed "W. L. Moffatt & Company, by W. L. Moffatt, president; defendant objected to the admission of the same on the ground that there was no charge in the indictment covering this evidence; the same was overruled and exception noted and said signature card was admitted in evidence, a further ground of objection thereto being that witness did not state that he was familiar with the writing or printing thereon and was not competent to testify thereabout; witness further stated that said card came from the files of said bank and that it was the only signature card there bearing the name W. L. Moffatt & Company; whereupon defendant moved the court to strike all of witness's testimony and the same was denied.

Whereupon, to further maintain the issues upon its part joined, the Government called as a witness one George R. Linkins,
22 who testified substantially as follows:

That he is in the real estate business in this city; that he knew Alois T. Pauli and Marie T. Pauli and handled their business affairs for many years; witness identified the Etchison notes and over the objection and exception that the same was hearsay was allowed to state that Mr. Pauli wanted to turn the notes over to Mrs. Pauli; that said notes were worth \$9,000; witness identified the series of notes in the \$13,250 transaction; that he sold the last series of notes and

gave a check in payment thereof; that witness talked to a man over the telephone who said he was W. L. Moffatt and that he never saw Moffatt; whereupon defendant moved that his telephone conversation be stricken on the ground that Moffatt was not sufficiently identified as the person talking to witness; the motion was denied and an exception noted; witness then identified a series of check totaling \$13,250, which were given for said notes; that said notes were worth \$13,250; that there were checks for only \$10,990 and not \$13,250; that witness paid the full amount of the notes less 2% commission; that he could identify all signatures on the back of said checks but those of Moffatt.

Whereupon to further maintain the issues on its part joined the Government called as a witness one Charles C. Koonen, who testified substantially as follows:

That he was a real estate salesman and that he knew the defendant; that he identified the said \$9,000 check; that he received the same from Mr. Baum, of the Mt. Vernon Savings Bank, indorsed it and turned it over to defendant; that he gave said bank the said \$9,000 notes therefor; that he was not familiar with defendant's signature.

Whereupon, to further maintain the issues on its part joined, the Government called as a witness one Robert T. Highfield, who testified substantially as follows:

That he was cashier of the Mt. Vernon Savings Bank; that
23 he identified the signature of Mr. Baum on the \$9,012.50 check; that witness produced some records from said bank, one of which was a note teller's settlement sheet, which was an original entry and not made by witness.

The Government then offered in evidence the said notes totalling \$9,000 and defendant objected on the ground that two of the 7 were not charged in the indictment, and this the Government conceded, but the Government offered the two to show a course of conduct; the objection was overruled and exception noted; defendant further objected to their admissibility on the ground that the indictment charged one offense of a total of \$9,000 and that the Government must prove that and not split the same; this objection the court overruled and an exception was noted.

Witness was then asked what the note teller's settlement sheet showed in connection with the said notes and the check for \$9,012.50; to this defendant objected on the ground that it was a book of original entry and not made by the witness; objection was overruled and an exception noted and witness was allowed to answer that the record showed that on October 1, 1927, the bank acquired the notes from Charles C. Koonen.

Whereupon, to further maintain the issues upon its part joined, the Government called as a witness one Daniel Dillon, who testified substantially as follows:

That in 1927 he was employed by W. L. Moffatt & Co. as a book-keeper; that W. L. Moffatt was the defendant in this case; that W. L. Moffatt was the only one in the firm; that he worked there about 10 months; that witness identified all of the signatures of W. L. Moffatt on the various instruments offered for identification heretofore, as well as the rubber stamp, W. L. Moffat & Co., thereon; that he identified his signature on certificates of stock issued to Marie T. Pauli by the Bankers Investment Trust Company, that he

24 was secretary and treasurer thereof; that he, Samuel B. Eaton, and Moffatt were the incorporators thereof; that he never kept any books for said trust corporation; that they did not have any books.

Whereupon the Government, to further maintain the issues upon its part joined, called as a witness one Samuel B. Eaton, who testified substantially as follows:

That from April on to the end of 1927 he was the employe of W. L. Moffatt & Co. and that the defendant is the W. L. Moffatt who belonged to said company; that he did not know whether it was really a company or not; that the company was not a partnership; that it was Mr. Moffatt.

Witness was asked what kind of work he did for the company, to which defendant objected on the ground that the indictment contained no charge against the company and the indictment did not charge the defendant with running the company; the objection was overruled and an exception noted. Whereupon witness answered that he worked in the office, on the switchboard and telephone, and did some research work; that he sold no stock; that he remembers a company known by the name of Bankers Investment Trust Corporation; that it was organized during 1927; that the incorporators thereof were Moffatt, Dillon, and himself; that he did not know of any bank account of said corporation; that he did not know how the money of said corporation was handled; that he was on a salary, paid to him by Moffatt; that he knew of no assets of the Bankers Investment Trust Corporation; that he left Moffatt in December, 1927; that the said corporation was formed for the investment of funds, the purpose being to buy bank stock with money obtained from investors in stock of said corporation; that is, that stock was to be sold in said corporation and the money obtained therefrom was to be put in said corporation for the purpose of buying different bank stocks and to take the profit from the average rise in price of all of them combined; that there were 15 or 20 salesmen for this stock, and that witness was vice president of said corporation.

25 Whereupon, to further maintain the issues upon its part joined, the Government called as a witness one George D. Horning, who testified substantially as follows:

That he was a member of the bar and was retained as attorney for Mrs. Pauli to take up with Moffatt a transaction concerning the purchase of stock by Mrs. Pauli in the Bankers Investment Trust Corporation; that this was about December 1, 1927; that he talked with his clients about the case and then called upon Moffatt.

Whereupon witness was asked to narrate a conversation he had with defendant about this transaction, and defendant objected thereto and asked leave of court to inquire as to the voluntariness of Moffatt's statement out of the presence of the jury, and the same was granted and the jury excluded when the following occurred:

Witness stated that he called on Moffatt about the middle of November, 1927, at the latter's office and explained his mission; that he stated to defendant that money had been obtained from his clients by defendant by false representations; that defendant stated to his clients that the Riggs National Bank was behind his company and that Mr. Pauli had found out that the Riggs Bank had no con-

nection with the company; that witness demanded payment in full of the amount of money, which was about \$31,000, and which had been given by his clients to defendant for which they had nothing but a receipt; that defendant replied that he had said something to witness's clients about the Riggs Bank, but that defendant did not just recall what it was; that the conversation went far enough for defendant to promise to return the money; that witness saw defendant from time to time thereafter on numerous occasions, each time demanding the repayment of the \$31,000; that this conversation occurred in the Hill Building; that the first thing he said was that

26 he was retained by the Paulis and Stolls in connection with the defendant's taking money from his clients under false representations; that defendant wanted to know something about the facts; that witness told them to him; that defendant said he would repay the money; that he does not think that he told defendant that if defendant did not repay the money he would sue him or witness would present the facts to the district attorney; that defendant offered to repay the money; that as a consequence of said conversation defendant did repay some of the money; that in this conversation he negotiated for a settlement of his client's claim.

Defendant thereupon moved to exclude from the jury the above testimony of said witness on the ground that the conversation was had with defendant for the purpose of settlement and that any statement made by defendant at that time was rendered inadmissible on the ground that it was involuntary and obtained from defendant with the implied promise that the differences of witness's clients and defendant could be adjusted provided defendant agreed to repay witness's clients the money they had invested. This the court overruled and defendant noted an exception.

Whereupon the jury returned and witness testified as follows:

That he talked with defendant about the middle of November, 1927, at defendant's office; that he went to Moffatt's office and told defendant that he represented Mrs. Pauli and the Stolls in connection with their purchase of shares of stock in a corporation; that witness's clients took the position that the money defendant had received was secured by false representations; that witness's clients had advised witness that that which induced them to purchase shares of stock in the Bankers Investment Trust Corporation was a representation by defendant that the Riggs National Bank stood behind the proposition; that witness's clients had told witness that after
27 investigation they had been advised by officials of the Riggs Bank that they had nothing to do with the Bankers Trust Investment Corporation; that the conversation lasted about an hour; that Moffatt said that he had mentioned the Riggs Bank to the Paulis and Stolls, but not in the way they had stated; that defendant said that if witness's clients were dissatisfied, defendant would repay the money; that witness advised defendant that he was there to secure a return to his clients of the money given to defendant; that defendant agreed to pay back the money; thereafter defendant promised to repay the money; that thereafter defendant paid to witness some stocks, on account of the money turned over to defendant by witness's clients, which witness had converted into cash, the amount of which was

about \$5,000 or \$6,000; that defendant paid no more on account; that defendant received through the mails certificates of stock in the Bankers Investment Trust Corporation for the money paid by his clients; this was about the time he received the stock from defendant; witness called defendant on the telephone and told him that he could not accept the shares of stock in settlement of the claim; that defendant replied that witness could hold them until defendant cleared up the matter and paid the Paulis and Stolls, at which time the shares of stock could be returned; that witness told defendant that if something was not done within a short time witness was going to take some other action; that he did not tell defendant what this action was going to be; that defendant told witness that the money obtained from purchaser of stock in said corporation was to be invested in bank and insurance company stocks; that defendant stated that he told witness's clients that the idea behind said corporation was a sound financial one and that the Riggs Bank had participated in investment

28 trusts; that defendant also stated something along the lines of buying stock of the Riggs Bank by said corporation. Defendant moved to strike all of witness's testimony on the ground that the same was inadmissible for the reasons above indicated, and the same was denied and an exception noted.

Whereupon the Government, to maintain the issues on its part joined, called as a witness one Christian Stoll, who testified substantially as follows:

That he was the husband of Ida Stoll; that he knew the Pauli family for thirty-five years; during the fall of 1927 he met the defendant; that in the month of October, 1927, he had a transaction with defendant concerning the purchase of certain stock; that it was October 4th; that defendant didn't say where he wanted to invest witness's money; that Moffatt said that that he belonged to an investment company; that Moffatt said that he wanted to invest it in a good cause and witness said all right; that defendant mentioned about banks, especially the Riggs Bank, was back of him and backing this; that when defendant mentioned the Riggs Bank witness looked at defendant and defendant said "Don't you trust me?" and also, "If these banks fail, Uncle Sam will fail also." That when defendant mentioned the Riggs Bank, witness consented; otherwise he would not have consented; that witness never signed any written contract with defendant; that witness identifies his signature to a contract exactly similar to that signed by Mrs. Pauli and dated October 4, 1927; that he wrote his name thereon; that witness's wife and daughter were present when witness talked to defendant; that his daughter introduced defendant to witness; that Moffatt told him that he, Moffatt, wanted to invest money for witness; that Moffatt did not say what he wanted to invest it in; that witness did not ask him; that he gave Moffatt cash, the amount he does not know, because his daughter fixed the transaction; that he gave Moffatt the money in checks; that he gave Moffatt the money in notes;

29 that it was \$5,000; that before defendant got the money or checks, defendant said that several banks were behind him, back of him, and even the Riggs National Bank is backing him and backing this; that the night before witness saw Moffatt, witness's daughter explained to witness about the transaction; that witness's

daughter told him that she thought Moffatt was a nice man and honest; that witness told his daughter to look into the transaction and see if it was all right; that he told his daughter that if she thought it was all right, witness would go ahead and invest; that when witness talked to defendant he was still of the same opinion concerning the investment, i. e., if his daughter thought the investment good, witness would invest; that after witness had talked to Moffatt, witness's daughter expressed the opinion to witness that the investment was good; that it was upon that ground that he turned the money over to defendant; that if Moffatt had not mentioned the Riggs Bank, witness would not have consented to giving him the money.

Whereupon, to further maintain the issues on its part joined, the Government called as a witness on Ida Stoll, who testified substantially as follows:

That she was the wife of the preceeding witness; that she had a conversation with the defendant in her home on October 4, 1927; that her husband and daughter, Marie, were present; that it was about the purchase of \$5,000 worth of stock; that she did not know the name of the stock; that defendant asked witness and her husband if they wanted to invest and defendant represented that he was the president of the Bankers Investment and Trust Company and we asked him if there was anybody back of him; that defendant had a long string of banks and the Baltimore Fire and Insurance Com-

30 and he said the National Riggs Bank; that defendant said that if the Riggs Bank failed Uncle Sam would fail, and that witness knew that neither of these would fail; that that is the reason they invested the money, and they would not have done so otherwise; that defendant mentioned a long string of banks.

Whereupon, to further maintain the issues upon its part joined, the Government called as a witness one Marie Louise Stoll, who testified substantially as follows:

That she was the daughter of the two preceding witnesses; that she knew the defendant; that she met the defendant the latter part of September or the first of October, 1927, at Mrs. Pauli's residence; that she was present at a conversation between Moffatt and Mrs. Pauli about the Bankers Investment Trust Corporation; that herself, Mr. and Mrs. Pauli, and Moffatt were present; that when the Paulis wanted to invest witness said she did not want the Paulis to take their money out and put it in there, in anything; that the Paulis said witness was foolish, because Moffatt had said that the Riggs Bank was back of him and back of the whole concern and about 40 or 50 other banks; that defendant handed them a list of papers and stated "you know, if these are behind you, and the Riggs Bank is back of you, you can't fail; Uncle Sam would fail first": that witness said that was pretty good, and defendant finally persuaded her and the Paulis; that witness heard Moffatt make the statement that the Riggs National Bank was back of him and back of the investment in the Bankers Investment Trust Corporation more than once, several times at Paulis and then at witness's home; that witness was present at her parents' home on October 4, 1927, when defendant made such representations; that witness introduced defendant to her

parents; that defendant made the same representations to her parents, all about the Riggs Bank and the fire and life insurance companies in Baltimore; that it was after such representations that

31 her parents made certain investments; that witness did not believe Mr. Peterson was present when Moffatt made these representations to Mrs. Pauli; that witness did not remember

Peterson being there during the transaction; that Peterson introduced Moffatt to the Paulis and was there several times, but witness was not there; that when the said representations were made to Mrs. Pauli, Moffatt, Mr. Pauli, and witness were the only persons present, and when they were made to the Stolls, only witness and her parents were present; that witness identifies Mrs. Pauli's handwriting on the contract for purchase of stock; that she saw Mrs. Pauli sign some papers, but does not know whether it was that contract; that witness knows Peterson; that witness was living with the Paulis at their home in September, 1927; that Peterson called several times and talked with the Paulis about Mr. Moffatt's proposition; that a man by the name of Keller had also been there to talk to the Paulis about the matter, but spoke to witness alone; that witness did not trust defendant, because after the investment was made defendant said to her, "Girl, you don't trust me," and because there was one night witness could not sleep and defendant came to the house the next day and said, "For goodness sake, I would like to give you a good thrashing"; that witness asked him why, and said: "Mr. Moffatt, you promised me we could have money back"; that witness was doubtful about the soundness of the proposed investment with Moffatt after she had talked to him; that Peterson came to see the Paulis several times; that Peterson brought Moffatt, introduced him to Mr. Pauli, and witness came in later; that a Mr. Keller first came to talk about the investment and he spent an hour or so trying to make the thing clear to witness; that Keller had books there that witness did not know anything about; that witness told Keller that she didn't understand, and he said he would have the president of the company, Mr. Moffatt, come to see witness; that Moffatt was at the Pauli house nearly every day from the first day

32 he came until October 4; that Moffatt was at the house 4 or 5 times before he got the first contract and money; that witness

remembers that Moffatt and Mr. Pauli got into a discussion about the Volstead Act; that Pauli and Moffatt discussed various liquors, liquers, etc., different brews and vintages; that Mr. Pauli did not say at that time that he understood the transaction; that Moffatt had been to the house and spoken to Mr. Pauli several times before the last aforesaid occasion; that witness heard defendant and understood him to say something about the Riggs National Bank and 45 or 50 other banks; that witness identified a printed list of banks as the one exhibited to her by defendant; that defendant told her and the Paulis that the Baltimore Life and Fire Insurance Company and the Riggs National Bank was in back of it, and that if they failed Uncle Sam would fail; witness was then asked if defendant did not tell her that it was the idea of the Bankers Investment Trust Corporation to sell their stock and from the sale of that stock they intended to buy shares of stock in the banks that were on the list which she had identified as well as stock in the Riggs

National Bank of this city, and to this she replied "Not in those words, he did not"; witness then answered the same question in the negative; that the list witness identified was Peterson's list; that witness and the Paulis had several lists of banks like that; that witness did not understand that the Trust Corporation was to buy diversified bank and insurance company stock; that witness was not told that said corporation was expected to profit from the fact that as an average bank stock increased in value rather than decreased; that there was something said about several banks; that the following then occurred:

Mr. BURNETT. "Now, wasn't it further explained to you and the Paulis that if you bought stock in the banks as shown on that list, defendant's exhibit for identification No. 8, together with the
33 banks which were enumerated in this book, defendant's Exhibit No. 1 for identification, that you would have an average increase in the value of your stock to quite an extent? Is that correct or not?"

The WITNESS. "That would have an average increase?"

Mr. BURNETT. "Yes; is that correct or not?"

(No response.)

Witness further testified that defendant came to the house of Mr. and Mrs. Stoll about twice before October 4, 1927; that witness introduced defendant to her father; that she did not tell her father that it was a good investment; that witness said that according to her uncle it was a good investment and that she further told her father that it was all right if all Moffatt said was true; that at that time she doubted the word of defendant; that she did not think that she expressed this fear to her father, but she did to her uncle; that she did not recall whether she so expressed her fear to her father; that she did not know whether she did or not, she would not like to say; that she was in doubt the entire time about the honesty of defendant.

That then and thereupon the Government offered in evidence the ledger account of the Lincoln National Bank and defendant objected thereto on the same ground as urged before—that it was improperly identified and that the witness produced to identify it was incompetent so to do, for the reason that he was not the man who made the entry and not the official record keeper; the said record was thereupon admitted in evidence over the exception of the defendant only to show an item of \$9,012.50, an item \$2,238.69, October 8, and \$6,778.33; that thereupon the said exhibit was read and explained to the jury in so far as the 3 items were concerned; that there was offered in evidence 3 stock certificates for 50 shares of common stock of Bankers Investment Trust Corporation in the name of Marie T. Pauli, the same for 33 shares of common stock, one for 40 shares of preferred stock; thereupon the Government offered in evidence the 12 notes of the \$13,250 transaction and the same were admitted.

34 That the Government thereupon closed its case, and defendant moved the court to require the Government to elect whether the Government was going to the jury on the counts charging false pretenses or those charging larceny after trust, and this on the ground that as the facts stood in the case it was a matter of law for the court

to say which offense had been proved and not a question of fact for the jury for the reason that the Government must take the position that Moffatt either came into possession of the money or notes of the complainant lawfully or legally or that he came into possession of them unlawfully or illegally; this the court denied, and defendant noted an exception. Then and thereupon defendant moved the court to direct a verdict of not guilty for the reason that the indictment charged that defendant took notes secured by a deed of trust and the same was not proved; defendant then moved the court to direct a verdict of not guilty on the counts in the indictment charging larceny after trust for the reason that the evidence failed to show that the notes of Mrs. Pauli were not intrusted to defendant for a certain purpose as alleged in the indictment, and failed to show that defendant got the notes for a certain purpose and refused or failed to do with them that thing for which they were given to him; and defendant moved the court to direct a verdict of not guilty on the counts charging false pretenses for the reason that the evidence failed to show that the Riggs National Bank was not in back of defendant and the Bankers Investment Trust Corporation; that Mr. Nevius's testimony was not sufficient to prove this allegation in the indictment and that the fact of Mrs. Pauli's statement that the defendant said the Riggs Bank was in back of him was not sufficient to take the case to the jury. The court thereupon overruled the motion requiring the Government to elect and the motions to direct a verdict of not guilty and defendant noted an exception.

Whereupon defendant, to maintain the issues on his part joined, called as a witness one Edgar M. Peterson, who testified substantially as follows:

35 That he knew Mr. and Mrs. Pauli; that he was present at their home on September 29, 1927, when the contract for the purchase of \$9,000 worth of stock in the Bankers Investment Trust Corporation was signed; that he had called at their home twice before the contract was signed; that he had transacted business with both of them for several years; that he sold property for them and looked after their interest that way; that he talked to the Paulis about a week before the contract was signed; that he then discussed with them the principles of an investment trust; that he told them that he thought it was a very good proposition, especially as the securities proposed to be purchased by the Bankers Investment Trust eliminated industrial stocks or the financial stocks; that insurance companies and banks had been selected for the investment of funds of the investment trust; that there were about fifty of these selected; that the fifty institutions, banks, and insurance companies which had been selected for the investment of these funds were leading institutions, and that he read them a list of the institutions; that before he read the list Mr. Pauli asked him if they had selected any Washington bank, and witness said that they had and that he thought the Riggs Bank was the one selected in Washington, and that he looked on the list and said here it is and then read the whole list to them; that witness stated to the Paulis that he had but recently joined the company's forces and he would prefer that the Paulis talk the matter over with Mr. Moffatt; that he introduced Moffatt to the Paulis; that Mrs. Pauli was out when they first got

there but later joined them; that very little reference was made to the investment trust; that the question of the Volstead Act came up and that it seemed that the minds of all of the parties, i. e., Moffatt and the Paulis, met harmoniously on the subject, and there was a discussion of varied brands of liquors; that they talked for an hour

or so and that the investment trust was scarcely mentioned;
36 that finally after everything had been discussed a great deal

Mr. Moffatt inquired if the Paulis had some securities they wanted to put in the investment trust; that the Paulis said they did not have the notes there, that they were in a safety box at Mr. Linkins'; that Moffatt asked them to give him an order for them, which they did; that Moffatt talked to Mr. and Mrs. Pauli when he was present and did not talk to them out of his presence; that witness never heard Moffatt say that the Riggs Bank was in back of him or the Bankers Investment Trust Corporation; that he was in a position where he could hear everything that was said throughout the interview; that he was there once before this; that witness's name on the contract for the purchase of \$9,000 worth of stock was placed thereon after he and defendant got back to their office; that the writing on said contract must have been Moffatt's, as he saw Moffatt do some writing on the table while he was at the Pauli home; that this was the only transaction between the Paulis and Moffatt of which he had any personal knowledge; that he got a 5% commission on the transaction; that witness understood that he had sold the Paulis the stock; that he thinks he got \$725 out of the deals; that he was with Moffatt several weeks trying to sell stock in the Bankers Investment Trust Corporation; that all he sold was the Pauli stock; that he did not sell the stock to the Paulis on the representation that part of the money of the Bankers Investment Trust Corporation was to be invested in stock of the Riggs National Bank of this city; that Moffatt had a list of 50 insurance companies and banks and that the funds of said corporation were to be invested in the stocks of these 50 concerns; that there was to be an advisory concern in New York to advise which was the best opportunity at which they were to invest the funds, said funds to be invested according to the price of the stocks at the time, those which they thought best to buy; that

the Riggs National Bank was one of the 50 listed; that that
37 bank was on the list he showed to the Paulis; that Mr. Pauli asked witness if there was any Washington bank on the list, and that witness looked it up and told Pauli that it was on the list; that the Riggs Bank was on the list, but there was no specification that Riggs Bank stock would be bought; the purchase of that stock would depend on the price, and what the advisory concern thought of it and the availability of funds; there was no preference of one stock over the other; that the funds were to be invested in the stock that had the most favorable bearing; that he handed out various papers and pamphlets as the compliments of W. L. Moffatt & Co.; that the selection of the stock was to be made or advised by Moody; that witness did not know anything about the inside operations of the corporation; that witness had no knowledge of whether any stock was purchased or not purchased by the corporation; that he did not know what became of the money; that he supposed that the \$9,000 obtained from the Paulis was to be invested; that during

the conversation between Moffatt and the Paulis there was some discussion about the purchase of a home by Moffatt as well as the purchase of an office building; that the Paulis had confidence in witness and he talked with them as friends concerning this investment; that the Paulis gave Moffatt an order on Mr. Linkins to turn over some securities to defendant and that defendant stayed about 5 minutes after that; that Mr. Pauli was a former brew master and that is the way the discussion about liquor arose; that Moffatt, Miss Stoll, Mr. and Mrs. Pauli, and witness were present at the conversation at the Pauli home; that Miss Stoll came in after the conversation of September 29, 1927, had started; that Miss Stoll was never present at any other conversation between witness and either of the Paulis; that it seemed that Miss Stoll was closely associated with the Paulis and was interested in the whole affair; that Miss Stoll made some remark about a church and Miss Stoll and Moffatt shook hands and Miss Stoll said, "Another bond between us"; that the Riggs Bank was not mentioned on September 29, 1927; that witness does not remember any such statement by Miss Stoll to the effect
38 that Moffatt did not look as though he trusted her.

Whereupon, to further maintain the issues on his part joined, the defendant, William L. Moffatt, was sworn as a witness and testified substantially as follows:

That he met the Paulis for the first time on September 29, 1927; that he saw them again on October 4, 1927; that he saw the Paulis 2 or 3 times between these dates; that some time elapsed before the certificates of stock were sent to the Paulis for the reason that some engraved certificates had been ordered and they did not come; that witness did not tell Mrs. Pauli or anyone in her presence that the Riggs Bank was in back of him or behind the investment of money in the Bankers Investment Trust Corporation; that nothing was said by witness to Paulis about the Riggs Bank at all; that witness went to the Paulis with Mr. Peterson; that Mr. Peterson had been to see them several times; that Peterson was in the employ of defendant as a salesman; that all of the months of October, November, and December elapsed before defendant sent Mrs. Pauli the certificates of stock. Witness was asked if he remembered Mr. Horning coming to his office and advising him that he, Horning, had been retained by Mrs. Pauli and the Stolls. To this defendant objected on the ground that the question was without the scope of the direct examination; that the court overruled the objection and defendant noted an exception; that witness answered that he remembered it; that at that time Mr. Horning told witness that the Paulis and Stolls were very dissatisfied and wanted to get out; that some one had talked to them or they had talked things over and were not as well pleased as they might be, and inasmuch as they were a nervous disposition and were bothering constantly, he, Mr. Horning, wanted to get the matter out of the way; that Mr. Horning told witness that he understood that there were untrue statements made about the Riggs Bank to the effect that that bank was behind witness, and witness replied,
39 "That is absolutely ridiculous." That witness told Horning that if his clients were dissatisfied the company, which was forming a board of directors at that time, would be more than

pleased to give the money back or resell the stock; that he told Horning that when the board of directors was formed and announced and as the campaign went on and subscriptions came in we would be glad to take their securities and resell them for them; that he did not resell these securities because he was supposed to have gotten some back at the time he made a partial repayment to Horning, but never received the same; that the repayment to Horning came from Moffatt personally and he promised to pay more back but never did; that the Bankers Investment Trust Corporation never had a bank account; that he sold a little over \$100,000 worth of stock in said corporation; that this amount went for expenditures, organization, and sales expense; that the money went into the account of W. L. Moffat & Co.; that account was withdrawn by checks signed by defendant alone; that the \$100,000 went to sales and promotion, \$8,000 going to a building at 1522 K Street, which was to house the corporation and W. L. Moffatt & Co.; that defendant did not own the building; that said corporation was organized in July, 1927, and stock was sold from then on; that the selling of stock stopped in October, 1927; that he was not sure of the last date, but that the men who were to go on the board of directors suggested and advised that the selling campaign stop at that time until we had gotten a board, and they at that time thought the charter was too conservative and wanted it more elastic, inasmuch as it only permitted the buying of bank and insurance company stocks—they wanted bonds, rails, and industrials, etc., included; that the board of directors consisted of defendant, Eaton, and Dillon at the time of the organization; that defendant was the only one who performed any corporate functions; that Dillon was the secretary and treasurer and took care of the banking under the name W. L. Moffatt account; that defendant received the \$9,000 worth of notes, as produced by the Mt. Vernon

40 Savings Bank, from Mrs. Pauli; that he sold said notes to said bank through Mr. Koonen; that the item of \$9,012.50 as shown on the ledger account of the bank was presumed by witness to be the check he received from the Mt. Vernon Bank in return for the Pauli notes; that witness admitted that the \$13,250 worth of notes testified about by Mr. Linkins were received by witness from the Paulis and were converted into cash; that Horning called witness, but no mention was made at that time of his clients having been defrauded; that Horning said his clients did not want the certificates, but they did want their money back; that witness stated that the only way that could be done would be to reissue them and resell them, and the board of directors would be formed shortly and the campaign would be on shortly; that the campaign never did go on; that witness admitted the contract of \$9,000 with the Paulis and the receipt of \$13,250; that witness talked to the Paulis 4 or 5 times; that he never talked to them before they turned over the \$9,000; that he saw them only on the day they turned it over; that after witness received the order for the notes from the Paulis he has no recollection as to how long he remained there, but that it was some time; that witness went back 2 or 3 times before he received the \$13,250; that witness did not make the representation that the Riggs Bank was in back of him, or behind the investment in the stock, or that they were interested in any way; that witness was

doing business with the Lincoln National Bank; that he saw Miss Stoll at the Pauli home; that after having sold the Paulis, witness went to the home of Mr. and Mrs. Stoll; that witness saw the Stolls on October 4, and one time later; that the Stolls had some money in the building and loan they wanted to invest and this they turned over to defendant; that witness did not say in the presence of Mr., Mrs., or Miss Stoll that the Riggs Bank was back of him; that witness, after an examination of his books, stated that he personally obtained

41 \$18,200 from the sales of the stock; that he would not say that the \$18,200 was to his personal credit, but that it was dis-

bursed for business purposes as well; that the money belonged to W. L. Moffatt at that time; that there was between \$125,000 and \$130,000 worth of stock sold in the said corporation, and this went to the account of W. L. Moffatt, and witness drew therefrom the said \$18,200 and that the balance, with the exception of some money put into a building, went for promotion expense and with the exception of money that witness refunded; that part of the \$18,200 witness drew went to take care of a part of the office affairs of W. L. Moffatt Co.; that the Bankers Investment Trust Corporation would have eventually gotten the money; that the corporation and the stockholders thereof did not get it; that by expenses witness meant overhead and salesmen's salaries, including the \$725 paid to Peterson; that witness produced a written record of every bit of the money taken in and spent by W. L. Moffatt and Co. in connection with said corporation; that the Pauli and Stoll transactions appeared in said record; that said records disclosed that W. L. Moffatt & Co. received on account of said corporation \$126,002.10, and the record showed an itemized account of the expenditure of a like sum; that when witness started to organize said corporation he employed Ralph Cusick as counsel thereof and later the law firm of Kerr, Wise & Shipe; that witness produced correspondence between the latter and himself showing that said firm accepted the business of said corporation from witness at an annual retained of \$5,000; that witness then produced various correspondence between himself and said law firm dealing with advise as to the manner of proceeding with the promotion of said corporation, defendant being the promoter thereof; said last correspondence outlined the terms of promotion and the consideration to be given to defendant for acting as such promoter; that one George R. Rock was working on the organization of a board of directors, and it was that gentleman's duty to interview various

42 men and then submit them to defendant and Kerr, Wise & Shipe; that witness produced written memoranda from said

Rock mentioning the names of various persons and inquiring as to their capacity to act on said board; said memoranda also showed that conferences were arranged at defendant's counsels' offices to talk over the organization of this board; that the proposed board did not like the charter of the Bankers Investment Trust Corporation and wanted the same broader and more elastic, with power to deal in industrial, rails, etc., and said proposed board thought that the corporation should not deal in bank and insurance company stocks alone; that the Bankers Investment Corporation was incorporated in Maryland and the certificate of incorporation in that State was

produced; that said proposed board wanted to organize another corporation under the laws of the State of Delaware and agreed to compensate the defendant with the same amount of stock in the new corporation as was out in the old one; that witness produced a written contract to this effect and offered to prove the same and introduce it in evidence, but the court refused to permit him to do so and defendant noted an exception thereto on the ground that it showed that the proposed board refused to act and organized their own company and then attempted to get defendant to accept a new contract; that from that time on the Bankers Investment Trust Corporation ceased to function; that witness produced a written document to show that he had paid back approximately \$100,000 to dissatisfied investors in the Bankers Investment Trust Corporation; that there is a balance unpaid to dissatisfied investors of approximately \$21,000; that witness started to enumerate the various persons paid back and the amounts thereof, whereupon he was stopped by the court and the United States attorney with the suggestion that he estimate the amount, which he did as \$100,000; that some of the money refunded came out of defendant's own pocket from money he has earned since; that an audit of defendant's books was made by one Kiefhaber and defendant did not know whether it was
43 before or after the audit that Judge Kerr refused to go on the board of directors.

That then and thereupon the defendant and the Government rested their cases and defendant renew'd all of his motions heretofore made at the conclusion of the Government's case; that the court required the Government to elect on which counts of the indictment it would go to the jury and the Government elected to go to the jury on the counts charging false pretenses, to wit, the 3d and 4th counts; that the defendant renewed his motion to direct made as to these counts at the conclusion of the Government's case and the same was denied and defendant noted an exception thereto.

That then and thereupon the following prayer was offered and granted on behalf of the Government, the defendant objecting thereto on the ground that it stated more than one proposition of law and was confusing to the jury:

The jury is instructed that it is not necessary that the false pretense or pretenses alleged in the indictment should have been the sole inducement which moved Mrs. Marie T. Pauli to part with the notes which she testified that she owned. It is enough if, in cooperation with other inducements and representations, if any, disclosed by the evidence, the alleged fraud, if you believe it was accomplished, would not have been accomplished except for the alleged false pretenses set out in the indictment. It is not necessary for the Government to prove that the false pretenses alleged were the sole inducement by which the property in question was parted with, if it had a preponderating influence sufficient to turn the scale, although other considerations operated upon the mind of the party.

That then and thereupon the following prayers were granted on behalf of the defendant:

I

43 The court instructs the jury that before they can convict the defendant they must find beyond a reasonable doubt that the witness Pauli parted with her property upon the representation made by the defendant that the Riggs National Bank of this city was back of defendant and behind the investment of moneys in the Bankers Investment Trust Company, and if the jury believe that the witness Pauli parted with her property for any other moving, efficient, and preponderating reason they must find the defendant not guilty.

II

The court instructs the jury that a false pretense is such a fraudulent representation of a fact, past or existing, by a person who knew it to be untrue, as is adapted to induce the person to whom it is made to part with something of value. If you do not believe beyond a reasonable doubt all of these elements existing in this case it is your duty to bring in a verdict of not guilty.

III

You are instructed that, in order to convict the defendant, you must believe from the evidence: (1) That some of the pretenses of an existing fact alleged in the indictment were made by the defendant; (2) that they were made designedly, and with an intent to defraud; (3) that such pretense or pretenses were false; (4) that the property was obtained by the means of such false pretenses, that is, but for the false pretenses the owner would not have parted with her property.

IV

The jury are instructed that the pretense or pretenses, as alleged in the indictment, must be not only false, but also of such a nature as is calculated to deceive. It must have enabled the defendant to obtain the property and have influenced or induced the witness Pauli to part with the same.

That then and there upon the court charged the jury as follows:

44 "Now, gentlemen, the defendant in this case is entitled to the presumption that he is innocent of this crime; and it is the obligation of the Government, under the law, to prove that he is guilty of this particular crime beyond a reasonable doubt to your satisfaction. It does not differ in the slightest degree with respect to those matters of the presumption of his innocence and the duty of the Government, from any of the much smaller cases that we have been trying here during your jury service.

"And, of course, the indictment against him is not evidence at all; and the presumption of his innocence survives with him under this indictment and sits with him during this trial until and unless you are satisfied beyond a reasonable doubt that he is guilty.

"Now, the indictment against him is brought in four counts, but there are only two transactions involved. There was a transaction of September 29 that involved the transfer of \$9,000 in promissory notes. And there was a late transaction, on October 4th, that involved the transfer of some \$22,000 in promissory notes. Those are the two transactions here charged in two different ways in this indictment: The first two counts say that it constituted the crime of larceny after trust. The last two counts charge the obtaining of the money by false pretenses. And the district attorney has elected to stand upon the last two charges. A man can not be guilty of four offenses for those two transactions. So that while under our practice you are entitled to take this indictment into the room with you, you are not entitled to read over the first two counts. But on the last two you have to say whether you think he is guilty or not. And this indictment when you take it with you has none of the weight of evidence in your minds; it is nothing but the formal charge brought against this man, and as to his guilt or innocence of which is to be decided by the evidence and not at all by the indictment. But under our practice you are entitled to take it with you.

46 "Now he is charged with having obtained those two sums of money under false pretenses, and since the dates are named in the indictment, videlicet, as lawyers call it, the precise date is not necessary to be proved; it is sufficient if the money was obtained or or about the dates named.

"Now, a false pretense as used in the criminal law and in this indictment must relate to a matter of existing fact, or a matter of past fact; it can not be based upon any expression of an expectation or a hope; it must, first, be made with reference to a matter of an existing fact; second, it must be false or untrue; third, it must be known to be untrue and made with the intention to deceive or defraud; fourth, it must be relied upon by the person to whom it is made, and must be the predominating and prevailing cause which brings that party to part with his property to his damage.

"Now, it is essential under this statute and under this indictment that you be satisfied beyond a reasonable doubt by the evidence that this man made these statements and that they satisfied the party. And that, of course, requires you to find not only the fact but the intent with which the statement was made. That is the clear duty of the jury. It occurs as it does in a murder case: What were the facts, and was it done with malice aforethought? It occurs in every burglary case, was it done with intent?

47 "Now, you have got the statement of these ladies, Mrs. Pauli, Mrs. Stoll, and Miss Stoll. And there is one other thing. The Stolls' name is brought in. You have nothing whatever to do with the Stoll transaction as an affirmative transaction. If Stoll parted with any money, we are not interested whatever in that. The transaction was admitted and is to be considered solely as being a contemporaneous transaction with the intention of showing the motive or intent. If you gathered any impression from the evidence that Stoll was defrauded out of any money, you have got to forget that. We are not interested in that for a moment, except as to what he said to Stoll, which, according to my recollection, was on the fourth of October, and was the date on which this second transaction is said to have been concluded in this case, and

he made certain statements there. Those statements are important here only as illustrating, if you think he has made the statements here.

"Now, Mr. Moffatt said upon the stand that he never made any of these allegedly false statements. If that is true, he is entitled to be acquitted. He said he never said to Mrs. Pauli or her husband that the Riggs Bank backed him in this financial transaction, or that the Riggs Bank was behind the Investment Trust Corporation. Mrs. Pauli said he did say so, and that was the controlling influence in her mind in parting with her money to him. She says that with respect to that transaction. And there is evidence here tending to corroborate that from some of these people. Now, how far does it corroborate it, the weight of the evidence, is entirely for you to decide in your own judgment.

"So that you have got here a flat contradiction in the testimony in what the defendant, Mr. Moffatt, says, and in what Mrs. Pauli says.

"Now, it is solely the function of the jury to determine the weight of the evidence, and you have got to do that by considering, first, how the story that each witness tells squares with your own experience in life; the ability of the witness, as you find it to be, to recall the details of what happened a few years ago; the disposition of these witnesses to tell the truth; and the interest which any witness may have in the outcome of the controversy here. All of those things go into the weight that you will give the testimony of each witness, and, consequently, to the weight of the whole testimony. Of course, we must not be influenced by the weight of a hair by the fact that the complaining witness in this case is an elderly woman, now a widow.

They have all got to be treated exactly alike here. And, of course, you must not have any prejudice in your minds because Mr. Moffatt sits here and is painted here as a scheming man who got this money. That has nothing to do with it. You have got to decide it on the evidence, and nothing else.

"Now, has either side any suggestions?"

Mr. BURNETT. "Has your honor finished?"

The COURT. "I have now said everything I think of."

Mr. BURNETT. "Well, we would like to take an exception to your honor's charge that 'Mr. Moffatt said that he never made the false statements; if that is true he is entitled to be acquitted; that Mrs. Pauli said he did, and that was a controlling factor, and there is evidence tending to corroborate that, and there is a flat contradiction of what Moffatt said and Mrs. Pauli said.' We take an exception to that language in your honor's charge.

"And then I have this further suggestion to make, that your honor in charging the jury left out of the picture altogether the witness Peterson. In other words, if you are going to refer to them, I think you should refer to all of them."

The COURT. "Of course, you may have your exception. I did not quite understand all that Mr. Burnett said. But if you have gathered an impression that I entertain any opinion with respect to the guilt or innocence of this defendant, that must be set aside now. It is entirely for you to say upon this evidence whether he is guilty or not.

And since you have got two distinct transactions, similar in character but differing in amounts and occurring upon different dates, your verdict may be guilty or not guilty upon both counts; and you may conclude that he is guilty upon one and not guilty upon the other. It is entirely for you to say.

"And here is your indictment. And the first two counts I have marked in pencil, or intended to mark them out of consideration altogether."

49 All of which exceptions, as stated in the foregoing bill of exceptions, were duly noted by the court at the time the same were severally taken, and said exceptions are signed as the several exceptions taken at the trial, this 21st day of March, 1930, nunc pro tunc.

WM. HITZ, *Justice.*

LEO A. ROVER, Esquire,
United States Attorney,
Washington, D. C.:

Please take notice that on the 21st day of March, 1930, at 10 o'clock a. m., or as soon thereafter as counsel may be heard, the proposed bill of exceptions, hereto attached, will be submitted to the court to be settled.

JAMES A. O'SHEA,
J. H. BURNETT,
ALFRED GOLDSTEIN,
Attorneys for Defendant.

Service of copy acknowledged this 24th day of February, 1930.

LEO A. ROVER,
U. S. Attorney.

MARCH 21, 1930.

I consent.

LEO A. ROVER,
United States Attorney.

No. 46688. U. S. v. William L. Moffatt. Bill of Exceptions. James A. O'Shea, J. H. Burnett, Alfred Goldstein, 402 Sixth St., N. W. Attorneys for defendant.

(Indorsed on cover:) District of Columbia Supreme Court. No. 5231. William Lee Moffatt, appellant, vs. United States. Court of Appeals, District of Columbia. Filed June 11, 1930. Henry W. Hodges, clerk.

COURT OF APPEALS,
DISTRICT OF COLUMBIA
FILED

NOV 28 1930

Henry M. Rodgers
CLERK.

No. 5231

In the Court of Appeals of the District
of Columbia

OCTOBER TERM, 1930

WILLIAM LEE MOFFATT, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA

BRIEF OF APPELLEE

LEO A. ROVER,

United States Attorney,

WILLIAM A. GALLAGHER,

Assistant United States Attorney,

Attorneys for Appellee.



**In the Court of Appeals of the District
of Columbia**

OCTOBER TERM, 1930

No. 5231

WILLIAM LEE MOFFATT, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA

BRIEF OF APPELLEE

ARGUMENT

I

*The Riggs National Bank not properly described
in the indictment.*

It is the contention of the appellee that the Court is entirely justified in taking judicial notice of the fact that all National Banks are corporations and accordingly when the indictment mentions in the third and fourth counts "The Riggs National Bank of this city" it necessarily follows that that particular bank is a corporation.

Sections 21, 22, and 23 of Title 12, United States Code, Annotated, provide for the formation and organization of associations for the purpose of carrying on banking business under the National Banking Act and Section 24 of said Title 12 specifically provides as follows:

Upon duly making and filing articles of association and an organization certificate, a National Banking Association shall become, as from the date of the execution of its organization certificate, a body corporate * * *.

So that from the time the Comptroller of the Currency issues the certificate to the bank under the National Banking Act, it becomes a body corporate. (See these cases: *Wallace v. Hood*, 89 Fed. 11; *Hood v. Wallace*, 97 Fed. 983; *Hood v. Wallace*, 182 U. S. 555; *First National Bank v. Murray*, 212 Fed. 140.)

II

The manner in which the Government proved The Riggs National Bank to be a corporation.

In addition to the fact that the Court did take judicial notice of the corporate existence of the bank, the Government called as a witness Ayon M. Nevius, who testified that he was Vice president of The Riggs National Bank and that the bank was a corporation. (Rec. 11.)

Irrespective of the provision of the National Banking Act, it is submitted that testimony of the Vice president of the bank was certainly sufficient

to prove the de facto existence of the bank as a corporation.

The two cases cited by appellant are not in point. The case of *People v. Struble*, 75 Ill. 162, 163, 113 N. E. 938, was a case wherein the defendant was charged with receiving stolen property, the *ownership* of the property being laid in a corporation. The State called as a witness a bookkeeper and cashier, who was asked: "How do they conduct their business?" The witness replied: "As a corporation, sir." The *ownership* of the property was a material averment in the indictment and it was of course necessary to prove the *ownership* as alleged.

In the case of *People v. Cherniak*, 216 Ill. App. 423, 426, the defendants were charged with conspiracy to obtain by false pretenses certain goods, the *property* of a corporation. The State called the general manager who stated only that the company did business "as a corporation."

It will be discovered that in both of these cases the allegation of ownership of the property was a most material one and that the means taken to prove ownership was to ask the very indirect question as to how the companies conducted their business, calling at most for an expression of opinion on the part of the witnesses.

In the present case, the Riggs National Bank is merely collaterally introduced into the case for the purpose of showing the false representation; no title or ownership is laid in the bank, nor is it con-

tended or alleged that the bank was prejudiced or defrauded in any way. A reference to the testimony of the principal complaining witness, Mrs. Marie T. Pauli, demonstrates that she thoroughly understood that it was the Riggs National Bank of this city which the defendant represented as being behind him and the stock in the Bankers Investment Trust Corporation, because in her direct examination she says:

That Moffatt said that the Riggs Bank was backing him; also, if the Riggs Bank failed, Uncle Sam would fail too; that witness would not have gone into it if Moffatt had not said the Riggs Bank, because we explicitly believe in the Riggs Bank; that Moffatt told witness that the Riggs Bank was behind all his dealings with me. (Rec. 9.)

That the circumstances of this case required only the proof at most of the de facto organization of the bank, is demonstrated by the following cases:

In the case of *United States v. Amedy*, 11 Wheat. 392, 409, the defendant was indicted for destroying a vessel with intent to prejudice the underwriters, who had placed a policy on the vessel. The question was raised as to whether the corporate existence of the insurance company would have to be proved strictly. The Supreme Court used the following language:

The case here is of a public prosecution for a crime, where the corporation is no

party and is merely collaterally introduced as intended to be prejudiced by the commission of the crime. Under such circumstances, we think nothing more was necessary for the Government to prove, than that the company was *de facto* organized and acting as an insurance company and corporation.

In the case of *Fields v. United States*, 27 App. D. C. 433, 445, this Court used the following language:

Under the allegations of the indictment, it was necessary to prove that the Washington Beneficial Endowment Association, the alleged owner of the fund, was a body corporate. This proof was attempted to be made in two ways: First, by evidence tending to show actual incorporation in April, 1877, through proof thereof from the records of the Registrar of Deeds for the District of Columbia and, second, by reputation. There were some irregularities in the proof of the articles of incorporation and, as it would require considerable space, we refrain from its discussion. Proof could either be made in that way or by other evidence tending to show that the corporation was *de facto* organized and acting as such.

III

The manner in which the Government attempted to prove that the defendant was not backed by the Riggs Bank.

The witness Nevius, a Vice president of the Riggs Bank, stated that he performed official acts for the bank, "made loans, opened accounts, discounted notes; that he was generally familiar with the transaction between the depositors of the bank and the bank itself" (Rec. 11); he thereupon testified that "the bank was not backing Moffatt (Rec. 11); that the Riggs Bank never did back Mr. Moffatt * * * that said bank was not behind said corporation (Bankers Investment Trust Corporation) in any capacity that he knew of."

This testimony certainly made out a *prima facie* case negating the fact or allegation that the Riggs Bank was backing either Moffatt or the stock of the Bankers Investment Trust Corporation, so that the only objection that could be made to it would be an argument of counsel affecting the weight that should be given by the jury to the statements of Mr. Nevius. Objection is made that the minutes of the bank were not produced. It is sufficient to say that the bank might have been backing Moffatt or his corporation and the minutes of the Riggs Bank be silent on the matter. So that while the Government could have called every officer of the Riggs Bank to testify to the same effect as did Mr. Nevius, testimony of Mr. Nevius stands alone, making a *prima facie* showing, and it is interesting to note that when the defendant took the stand he did not contend that the Riggs Bank was backing him, but stood on the ground that he had never made the allegation set forth in the indictment.

IV

Motion to elect.

It should be noted at the outset that, at the close of the entire case, the Government elected to stand on the third and fourth counts of the indictment, charging the crime of false pretenses, so that we are not confronted with the situation that prevailed in the case of *Davis v. United States*, 37 App. D. C. 126, 133, wherein the entire case was left to the jury and the jury brought in a verdict of embezzlement and false pretenses concerning the same transaction, which verdict was held by this Court to be inconsistent.

It is conceded, of course, that the question of whether the Government should be compelled to elect and if so, at what stage of the case, is left to the sound judicial discretion of the trial judge, and that error will not be found unless there has been a gross abuse of such discretion. Appellant in his brief cites the case of *Kidwell v. United States*, 38 App. D. C. 566, 570. This case is not comparable at all to the present case. In the *Kidwell* case, the defendant was charged in an indictment in two counts with carnal knowledge, the first count setting the date of the offense as the 18th of December, 1908, with one girl and the second count alleging the offense as of July 15, 1909, with another girl. There was apparently no connection at all between the two crimes and, as this Court well said in that case, "it is difficult to conceive of a condition more

embarrassing or prejudicial to the defendant than the one here presented.”

In the instant case, the transactions set forth in the first and second counts were exactly the same transactions as set forth in the third and fourth counts, the only difference being that the transactions were charged as larceny after trust in the first two counts and as false pretenses in the third and fourth counts.

In the case of *Clifton v. United States*, 54 App. D. C. 104, the defendant was charged with manslaughter, the indictment charging the same offense in different ways in two counts and this Court, through Mr. Justice Van Orsdel, used the following language:

It is urged by counsel for appellant that the Court should have sustained his motion to require the prosecution to elect the count upon which it would go to trial. Motion for election was made by counsel before the introduction of any testimony and was not thereafter renewed. At this stage of the proceedings, the prosecution could not have been required to elect. To require an election before testimony is offered, unless the reasons are apparent on the face of the indictment, might result in a failure of justice. Appellant was not entitled to an election in any event until it became necessary for him to make his defense. Even then the request will be denied unless it is clearly apparent that without an election the defendant

would be prejudiced. (*Corbin v. United States*, 264 Fed. 659, 660.)

In the *Corbin case* mentioned in the Court's opinion the defendant was charged in an indictment containing four counts, three felonies and one misdemeanor, and the Court used the following language:

The denial by the Court in the exercise of this discretion of a motion for election is not reviewable error * * *. It is also apparent that, if there had been error in the action of the Court in overruling the motion, such error was made entirely harmless by the later action of the Court when he withdrew the fourth count from the consideration of the jury and directed the verdict thereon in favor of the defendant.

And so in this case, the offenses being for the same act or transaction and of the same class of crimes, they were properly joined, and as the Government elected to go to the jury on only the third and fourth counts at the end of the Government's case, no possible prejudice is suffered by the defendant.

As to the remaining assignments touched upon by counsel for the appellant, we think it sufficient to say that it was absolutely immaterial what sort of a contract the defendant had with the Bankers Investment Trust Corporation; the complaining witness had no relations with that corporation and it mattered not whether the Bankers Corporation

had failed through mismanagement or otherwise of someone other than the defendant. That was a matter which had no place in the trial of the defendant for larceny after trust and false pretenses. A reading of the Court's charge impresses one with the absolute fairness of it and upon the entire record it is respectfully asked that judgment should be affirmed.

Respectfully submitted.

LEO A. ROVER,

United States Attorney,

WILLIAM A. GALLAGHER,

Assistant United States Attorney,

Attorneys for Appellee.

